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IN THE

Supreme Court of the United States

October Term, 1957

No. 100

GILBERT GREEN AND HENRY WINSTON,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (R. 73) [1] is reported at 241 F. 2d 631. The opinion of the District Court in *United States* v. *Green* (R. 66) is reported at 140 F. Supp. 117.

Jurisdiction

The judgments of the Court of Appeals were entered on February 11, 1957. On February 21, 1957 an order was entered by Mr. Justice Harlan extending the time for filing the petition for certiorari to April 12, 1957. The petition

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[1] "R." refers to the printed record.

present to the District Court a proposed order that petitioners "personally surrender to the United States Marshal" on that date (R. 7, 57-60). The following day, counsel for petitioners advised the District Judge Ryan before whom the matter was pending that they would have all of the *Dennis* defendants in court on July 2. Counsel thereupon notified the defendants, including petitioners, to be in court on July 2, and was assured by them that they would be present (R. 8-11).[4]

Petitioners did not appear on July 2, at which time Judge Ryan signed the proposed order requiring their surrender, declared their bail forfeited, and issued bench warrants for their arrest (R. 7, 12, 59-60). They were not apprehended but surrendered voluntarily, Green on February 27, 1956 and Winston on March 5, 1956 (R. 13, 42).

Immediately prior to his surrender, each petitioner mailed a statement to the press announcing that he would give himself up and stating the reasons for his earlier failure to do so. In substance, petitioners stated that they had chosen flight in 1951 as a means of resisting what they believed to be a trend toward war and fascism in this country, and that their surrender was the result of what they regarded as a change in the political climate which made possible the restoration of the Bill of Rights and the preservation of peace (R. 20, 39-42, 64-65). Green made similar statements when interviewed by the press upon his surrender (R. 15-18). These statements acknowledge that, as counsel conceded, both petitioners had fled to evade imprisonment. However, there is nothing in the statements or in any of the other evidence to indicate that either petitioner had actual notice or knowledge of the order of July 2, 1951 which he was charged with wilfully and knowingly disobeying.

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[4] The facts concerning counsels' representation to Judge Ryan and notification of petitioners were established by the introduction in evidence of the July 3, 1951 transcript of colloquy in the *Dennis* case (R. 8-11).

At the close of the evidence, each petitioner moved for acquittal on the ground that the evidence was insufficient to sustain a conviction (R. 21). These motions were denied, as was petitioners' contention that a prison sentence for criminal contempt may not exceed a term of one year (R. 31). The District Court adjudged each petitioner in contempt and sentenced him to the penitentiary for three years, consecutive upon the five year sentence imposed in the *Dennis* case (R. 72-73). The Court of Appeals affirmed (R. 79).[5]

Summary of Argument

I. There was no evidence that petitioners had knowledge of the existence of the order which they were convicted of "knowingly disobeying."

As the District Court's summary of the evidence demonstrates, there was no direct evidence of such knowledge. Nor was there circumstantial evidence from which knowledge could be inferred. The proof that petitioners knew they were to appear in court on July 2, 1951, the inference that they must have realized that they might be committed on that day, and the acknowledged fact that they fled to avoid service of sentences they knew were in store for them cannot sustain the convictions. Proof that they had knowledge of the July 2, 1951 order for their surrender was required. But all of their conduct was fully consistent

[5] In the Court of Appeals, petitioners did not brief or argue the insufficiency of the evidence or the court's want of jurisdiction to hold them in contempt since both issues had been decided adversely to them by the same court in affirming the convictions of two other *Dennis* defendants who had absconded. *United States* v. *Hall*, 198 F. 2d 726, cert. den. 345 U. S. 905; *United States* v. *Thompson*, 214 F. 2d 545, cert. den. 348 U. S. 841. However, petitioners expressly reserved the right to present to this Court the issues not argued in the Court of Appeals (R. 74).

with ignorance of the existence of that order. Accordingly, the evidence cannot give rise to an inference of guilty knowledge, much less prove it beyond a reasonable doubt.

The convictions cannot be sustained on the theory adopted in *United States* v. *Hall* that petitioners had "notice" of the order of July 2.

In the first place, all that the evidence shows is that petitioners' counsel informed them that their presence in court on July 2 was required. There was no evidence that petitioners were notified that an application for an order for their surrender would be made on that day.

Second, petitioners were charged with disobedience of the order of July 2 which they "well knew" to be outstanding. Accordingly, the convictions cannot be sustained on the theory that although petitioners had no actual notice or knowledge of the order, they were chargeable with notice of it as a matter of law.

Finally, the proposition that one who has notice of an application for an order may be held liable for violating it is inapplicable to criminal contempts. The authorities uniformly hold that actual knowledge of the making of an order is prerequisite to a conviction for contempt of its provisions. Moreover, a contrary rule would deny the accused the presumption of innocence and violate due process.

Nor can the convictions be sustained on the theory, also advanced in the *Hall* case, that petitioners committed contempt, not by violating the July 2 order for their surrender, but in disobeying a prior order (presumably made on June 29) that they appear in court on July 2. In the first place, there was no evidence that the District Judge made any such order, and the trial court made no finding to that effect. Moreover, since petitioners were tried for

and convicted of violating the order of July 2, the convictions cannot be sustained on the ground that they violated a different order, thereby committing a different offense.

II. Disobedience of the order requiring petitioners to surrender for commitment is not punishable as a contempt.

The proceedings against petitioners and the other two *Dennis* defendants who absconded appear to be the only cases in the entire history of Anglo-American law in which a defendant, enlarged on bail, has been prosecuted for criminal contempt of an order for his appearance or surrender.

The history of 18 U. S. C. 401 and an analysis of its provisions demonstrate that the contempt prosecutions of the *Dennis* fugitives are not only unprecedented but unauthorized.

Since section 7 of the Judiciary Act of 1789 did not define "contempts" its application was confined to conduct which was punishable as a contempt at common law. The common law did not punish absconding in violation of an order for the appearance or surrender of the accused as a contempt but by a process of outlawry which became final only after the failure of the accused to respond to five successive orders for his appearance. Inasmuch as the offense of absconding was not a contempt at common law, it was not punishable as such under section 7 of the Judiciary Act.

The Act of March 2, 1831 did not extend but curtailed the range of conduct which the courts could punish as contempt. 18 U. S. C. 401 was derived from and has the same purport as the 1831 Act. It does not define contempts but, like its predecessor, is cast in the form of a limitation on the judicial power to punish them. Accordingly, the third clause of that section does not enlarge the class of

orders for disobedience of which the contempt power may be invoked. The contrary holding in the *Hall* case misreads the text of 18 U. S. C. 401 and ignores its origin and history.

The decision in *Hall* also ignores the fact that the extraordinary power of summary punishment exercised in contempt cases is bottomed on the necessities of the administration of justice. The total lack of precedent for the proceedings against the *Dennis* fugitives demonstrates that there is no foundation in necessity for this novel use of the contempt power. Moreover, the innovation sanctioned in *Hall* has a vindictive quality, since it was conceived at the height of the anti-Communist hysteria and has been used exclusively against four Communists to impose punishment over and above their sentences for a political crime.

III. The trial court was without power to sentence petitioners to terms in excess of one year.

The federal courts do not have unlimited power to punish criminal contempts by imprisonment for any term up to life, but are restricted to the imposition of sentence as in the case of offenses which are not infamous. Since an infamous offense is one which may be punished by confinement in a penitentiary, and such confinement is authorized where the sentence exceeds one year, it follows that all offenses punishable by imprisonment for a longer term are infamous.

The conclusion that contempt is not an infamous offense (and hence not punishable by imprisonment for more than a year) finds support in the provisions of 18 U. S. C. 401 and its predecessors and in the principle that ambiguities in a criminal statute must be resolved in favor of the

accused. And the fact is that there is no reported case, federal or state, of infamous punishment for contempt prior to 1916.

This century and a quarter of undeviating American practice was frozen into statutory law by section 24 of the Clayton Act of 1914 which provides that contempts excluded from the provisions of sections 21 and 22 "may be punished in conformity to the usages at law and in equity now prevailing." The changes in the phraseology of section 24 which accompanied its codification in 18 U. S. C. 402 did not change the effect of the original enactment. Section 402, like its predecessor, codifies the usage as to punishment which prevailed in 1914 and prohibits contempt sentences in excess of one year.

The same limitation is imposed by Rule 7(a) of the Federal Rules of Criminal Procedure that, "an offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment." Since contempts never have been and, under Rule 42, are not prosecuted by indictment, they may not be punished by imprisonment for more than a year.

It is significant there have been only two reported state court cases of infamous punishment for contempt, in both of which the sentences were held invalid on appeal. And no state statute which regulates criminal contempt sentences provides for a term in excess of one year.

Since 1916, there have been nine reported cases in the federal courts in which criminal contempt sentences in excess of one year have been affirmed. But the question presented here was not raised or considered in any of them except *Creekmore* v. *United States* (C. A. 8, 1916), which does not mention section 24 of the Clayton Act and antedates the Federal Rules by many years.

The court below rejected petitioners' construction of section 24 of the Clayton Act. It did not regard the century and a quarter during which there had been no infamous punishment for contempt as establishing a "prevailing usage." It accounted for the practice by assuming that no case presented itself before 1914 which merited a longer sentence. The assumption is patently unreasonable. Moreover, the court ignored the fact that Congress enacted the contempt provisions of the Clayton Act because of its recurring concern over judicial usurpation of power in contempt cases and evidently intended by the prevailing usage clause of section 24 to prohibit innovations in the punishment of contempts not covered by sections 21 and 22. Finally, the court's construction of the prevailing usage clause makes it a redundancy. For the court could not suggest any practice which the clause was designed to freeze into statutory law.

Contrary to the opinion below, the enactment in 1954 of 18 U. S. C. 3146, making bail jumping a crime punishable by imprisonment for five years, is wholly irrelevant to the character of the sentence which may be imposed for criminal contempt.

At the very least, it is a tenable conclusion that section 24 of the Clayton Act, Rule 7(a) of the Criminal Rules and 18 U. S. C. 401 limit criminal contempt sentences to terms of not more than a year. If so, the conclusion should be adopted. For a contrary conclusion would require the Court to decide whether criminal contempt is a "crime" within the meaning of the clause of the Fifth Amendment requiring infamous crimes to be prosecuted by indictment. The Court has never been confronted with this question. But many constitutional and statutory provisions for the protection of those accused of crime have been held applicable to criminal contempts. The one exception is the holding that criminal contempts are not covered by the

jury trial requirement of the Sixth Amendment. The historical error on which this exception rests should not be extended to other constitutional guarantees.

While the opinion below acknowledged the existence of the constitutional question, the court did not consider it relevant to the construction of section 24 of the Clayton Act, Rule 7(a) and 18 U. S. C. 401. It resolved the question against petitioner because "it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceeding must be by an indictment, and yet that it need not be tried to a jury." But there is no rule of construction which requires compounding an error for the sake of being consistently wrong. Moreover, petitioners' contention involves no anomaly. If criminal contempts are not subject to infamous punishment, they are not infamous crimes within the Amendment and need not be prosecuted by indictment.

If Congress thinks it desirable to exact infamous punishment for contemptuous conduct of a serious nature, it can of course make such conduct a crime. Accordingly, adoption of petitioners' contention will simply assure an accused the protection of indictment and trial by jury before he can be convicted of an infamous offense, penalized by a prolonged penitentiary sentence and subjected to the disabilities imposed upon felons.

IV. The trial court abused its discretion in sentencing petitioners to imprisonment for three years.

Except for the cases of the other *Dennis* fugitives (Hall and Thompson), there has been no reported contempt sentence in excess of two years. Petitioners' cases are distinguished from those of Hall and Thompson since the latter were apprehended while petitioners voluntarily submitted themselves to the authority of the court.

ARGUMENT

I. There Was no Evidence that Petitioners Had Knowledge of the Existence of the Order Which They Were Convicted of "Knowingly Disobeying."

Each petitioner was charged with and convicted of "wilfully and knowingly disobeying" the District Court's order of July 2, 1951 which he "well knew" to be outstanding, requiring him to surrender to the marshal for commitment (R. 3-4). Knowledge by petitioners of the existence of this order was therefore an essential element of the offense[6] and one which required proof beyond a reasonable doubt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444.

The Government, however, introduced no proof that petitioners had knowledge of the order in question. This appears from the District Court's summary of the evidence in its written opinion in the *Green* case (R. 67):[7]

> "The evidence showed that Mr. Sacher, an attorney in the [*Dennis*] case, personally advised the respondent on June 29th that he had to be in Court on July 2, 1951. There was other evidence that thereafter, but before July 2, respondent left his New York City address and was not seen there again. There was further evidence that several days before respondent surrendered, he issued a written statement to the press admittedly signed by him which conclusively established that he had remained in hiding to avoid serving the sentence to which he had been committed. Furthermore, on the day on which he surrendered, respondent made statements to the reporters who

[6] This follows not only from the nature of the charge but from the principle that a person may not be convicted of contempt of an order unless he had knowledge of its existence and intentionally disobeyed it. *Wilson* v. *North Carolina*, 169 U. S 586, 600; *Kelton* v. *United States*, 294 F. 491, cert. den. 264 U. S. 590.

[7] The District Court did not write an opinion in the *Winston* case.

> were present on the Courthouse steps which also conclusively established that he had knowingly and wilfully absented himself so as to avoid serving a sentence which he knew had been imposed upon him."

The court concluded (*ibid.*) that this evidence "was sufficient to establish, beyond a reasonable doubt, that the respondent knowingly disobeyed the order [of July 2, 1951] of Judge Ryan".

This conclusion is a *non-sequitur*. The court cited no direct evidence that petitioners had knowledge of the order, and there was none. Nor, as appears from the court's summary, was there circumstantial evidence which could give rise to an inference of the required *scienter*.

The evidence established that petitioners knew they were to appear in court on July 2 when, in all probability, they would be committed as a result of the affirmance of their convictions. It is therefore obvious, as their counsel conceded, that petitioners fled to avoid service of the sentences which they knew were in store for them. That this was the purpose of their flight was further indicated, as the District Court found in the passage quoted above, by the statements they made upon surrendering (R. 15-18, 20, 39-42, 64-65). Thus petitioners' realization that they would probably be committed on July 2 is sufficient to account for their flight and for the reasons they later gave for absconding. But proof that petitioners believed they were to be committed on July 2 cannot sustain their convictions. Proof that they had knowledge of the July 2 *order for their surrender* is required. As we have shown, however, all of their conduct is explainable on the premise that they had no knowledge of that order, and is therefore consistent with ignorance of its existence.[8] Accordingly, the evidence can-

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[8] In the *Winston* case, the District Court found that Winston's statement to the press upon his surrender showed "that he intentionally failed to surrender, knowing that he was expected to surrender

not give rise to an inference of guilty knowledge, much less prove it beyond a reasonable doubt. *Pennsylvania Ry. Co.* v. *Chamberlain*, 288 U. S. 333, 339-40.

Apparently recognizing the vulnerability of its finding on the issue of knowledge, the District Court made the further finding in its written opinion in the *Green* case "that respondent had *notice* of the order [of July 2, 1951] and wilfully disobeyed it" (R. 67, emphasis supplied).[9] The court cited *United States* v. *Hall* (C. A. 2), 198 F. 2d 726, in support of this finding.

In the *Hall* case, a majority of the court, Judge Biggs dissenting, sustained the conviction for contempt of another absconding *Dennis* defendant. Hall was tried on a charge identical with the charges against petitioners, and the evidence against him was substantially the same as that in the present cases.[10] Hall, like petitioners, was notified by his counsel on June 29, 1951 that his presence in court was required on July 2, and absconded prior to that date. Before his flight, he made a speech which demonstrated awareness that he was about to be imprisoned. When apprehended, he was found to have disguised his appearance. There was no other evidence of *scienter*.

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because of an order of this Court." The court stated that, "This appears very clearly from the fourth paragraph of this statement in which he says that he chose the path he did as a method of struggle against a growing fascist menace, and that the hardships and privations that this entailed were difficult." (R. 43.) Obviously, the court's paraphrase of the statement does not show that Winston had knowledge of the order for his surrender, but establishes at most that he fled to avoid imprisonment. The full text of the statement (R. 39-42) proves no more.

[9] In the *Winston* case, the court made no finding as to notice, but rested its judgment entirely on the finding that Winston had knowledge of the order (R. 42-43).

[10] Hall, however, did not surrender voluntarily but was apprehended. See 198 F. 2d at 727.

The Court of Appeals did not consider whether the evidence was sufficient to establish that Hall had actual knowledge of the order of July 2, 1951. It held, however (at p. 730) that the record supported a finding "that respondent had complete notice of the order and wilfully disobeyed it." To this it added (*id.*, ftn. 7):

> "That this was a notice to appear for the order of commitment, rather than that order itself, raises no question; the notice, too, formed part of the court's command. See *Pettibone* v. *United States*, 148 U. S. 197, 206."

The court's theory of guilt is explained by the passage from the *Pettibone* case upon which it relied. The passage reads (148 U. S., at 206, emphasis supplied):

> "In matters of contempt, persons are not held liable for the breach of a restraining order or injunction, unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued, or the order entered, *or at least that application is to be made;* but without service of process or knowledge or *notice or information of the pendency of the proceedings,* a violation cannot be made out. 2 Dan. Chan. Pr. (4th Amer. ed.) 1684; 2 High on Injunctions (3d ed.) §§ 1421, 1452; *Winslow* v. *Nayson,* 113 Mass. 411." (Emphasis supplied.)

The court's citation of this passage indicates that it sustained Hall's conviction on the theory that notice to him that an application would be made for the order of July 2, 1951, followed by his flight, was sufficient to sustain the charge that he was in criminal contempt of the order once it was entered. There are three errors in this theory of guilt as applied to petitioners.[11]

First, there was no evidence that petitioners were notified that application was to be made for the order of July 2.

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[11] The affirmance of Hall's conviction was erroneous for the same reasons.

All that the evidence shows is that their counsel informed them that their presence in court on July 2 was required (R. 8-11). There is nothing to indicate that counsel informed them of the purpose for which their appearance was required, and there is therefore no basis in the evidence for the inference that they knew that application would be made for an order requiring their surrender.[12] Indeed, the written opinion of the District Court in the *Green* case contains no finding that Green was notified of the application. All that the court found was that counsel "personally advised the respondent [Green] on June 29 that he had to be in Court on July 2, 1951" (R. 67). Thus the court's finding fails to support its conclusion (*ibid.*) that Green "had notice of the order".[13]

Second, the charges against petitioners were not based on the theory that they had notice that the order of July 2 would be applied for. Instead, they were charged with disobedience of the order, knowing that it had been made. The affidavits of the United States Attorney upon which the proceedings were initiated alleged that petitioners "well knew of the *outstanding* order and decree of this Court" (R. 3, emphasis supplied), and both the order to show cause and the specifications charged that petitioners "knowingly" disobeyed the July 2 order (R. 1, 4). Accordingly, the

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[12] Of course, counsel's knowledge that the application would be made cannot be imputed to his client in a criminal contempt proceeding. *In re Cary*, 10 F. 622, 627; *In re Kwelman*, 31 F. Supp. 23.

[13] On the basis of identical evidence in the *Winston* case, the court made the similar finding that Winston "knew that he was supposed to be in court and advised to be in court" (R. 42). The court added, however, that Winston "knew certainly from the conversation with his counsel on the previous Friday that such an order [for his surrender] was being prepared; he knew that he was expected to surrender himself" (*ibid.*). If this conclusion can be construed as a finding that Winston knew that the order of July 2 was to be applied for, it is without support in the evidence or in the court's own finding as to the evidence.

conviction cannot be sustained on the theory that although petitioners had no actual notice or knowledge of the order, they are chargeable with notice of it as a matter of law. *Cole* v. *Arkansas*, 333 U. S. 196.

Finally, the statement in *Pettibone*, quoted above, that a person who has notice of an application for an injunction may be held liable for its breach, is inapplicable to liability for *criminal* contempt. The passage containing this statement was dictum [14] in which the Court did not distinguish between civil and criminal contempts. But the three authorities which the opinion cites state unequivocally that actual knowledge of the making of an order is prerequisite to a conviction for contempt of its provisions.

2 Daniels, Chancery Pleading and Practice § 1684 (4th Amer. ed.) states the rule applicable to criminal contempts as follows:

> "Before the Court will punish for a breach of an injunction or restraining order, it must be clear that the party *knew that the injunction had been issued, or that the order had been made* * * *.
>
> "In some cases, a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given. Thus, it was held by Lord Harwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice; and if the party remains in Court, until the order is about to be made, he cannot, by leaving *at that instant*, avoid its consequences." (Emphasis supplied.)

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[14] The case involved the validity of an indictment for obstructing justice by committing acts prohibited by a labor injunction. The Court held the indictment defective because it failed to allege that the accused had knowledge of the issuance of the injunction or even of the pendency of the proceeding which they were charged with obstructing.

Winslow v. *Nayson*, 113 Mass. 411, 420 summarizes the authorities as holding that:

> "* * * when the court has pronounced an order for the immediate issue of an injunction, a person who has *actual notice that the order has been made* and disobeys it, may be held guilty of a contempt, even before the injunction has been issued, or the order has been formally drawn up and served upon him." (Emphasis supplied.)

Similarly, 2 High on Injunctions § 1421 (3rd ed.) states:

> "The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was *actually apprised of the existence of the order* at the time of committing the acts constituting the violation." (Emphasis supplied.)

See also, *id.* § 1422.

It is clear from *Pettibone's* citation of these authorities that the Court did not intend to intimate that a person may be held guilty of criminal contempt without proof of actual knowledge of the existence of the order he is charged with disobeying. Research has disclosed no case other than the cases of the four absconding *Dennis* defendants [15] which so holds.[16] Contrariwise, it has been held that a defendant in a suit for an injunction cannot be held in criminal contempt for violating the injunction after learning that the case had been decided against him but before being informed that the court had directed that the injunction issue.

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[15] Including *United States* v. *Thompson* (C. A. 2), 214 F. 2d 545, which followed and was decided on the authority of the *Hall* case.

[16] Judge Biggs' dissent in the *Hall* case states (at 733) that "no case has been cited to us and I have found none where the doctrine of constructive notice has been applied in a criminal case including a criminal contempt proceeding."

Dowagiac Mfg. Co. v. *Minnesota Moline Plow Co.*, 124 F. 736, aff'd, 129 F. 1005.[17]

The decision in *Hall* is not only contrary to the authorities but violates constitutional guarantees. In essence, it rests on the proposition that an accused who had notice of an application for an order will be presumed to have knowledge of the order, if one is issued. But applications do not automatically or necessarily eventuate in orders. Courts frequently deny them or grant them in modified form. Hence, a person who has notice of an application will nevertheless remain in ignorance of the result unless it is communicated to him in some way. There is therefore no rational basis for presuming knowledge of an order from notice that an order will be applied for. Whatever the rule may be in civil suits, the presumption indulged in by the *Hall* majority is impermissible in a criminal case. For it denies the accused the presumption of innocence and violates due process. Cf. *Tot* v. *United States*, 319 U. S. 463.

As the dissenting opinion in *Hall* states (at 734):

> "To base a conviction for criminal contempt upon *constructive* notice is too close to basing a conviction on *constructive* contempt. But the question presented in the instant case is really one of due process. Proof of actual notice or knowledge on Hall's part that the order of July 2 had been entered is a constitutional requirement under all the circumstances." (Emphasis in the original.)

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[17] There, the defendant in a patent infringement case was charged with criminal contempt for making sales of the infringing device after the Court of Appeals had reversed a decision in its favor and remanded with directions that an injunction issue. The defendant was acquitted on the ground that there was no proof that it had knowledge of the direction of the Court of Appeals that an injunction issue, and that such knowledge could not be presumed from the fact that the defendant knew that the judgment in its favor had been reversed.

We submit that Judge Biggs is right, and that since there was no proof that petitioners had actual notice or knowledge of the existence of the order of July 2, 1951, their convictions cannot stand.

The majority opinion in *Hall* suggests an alternative theory of guilt. It states (at 730):

> "Hence from the uncontroverted evidence it appeared that there was a specific order for his [Hall's] appearance, that was directly communicated to him, and that he wilfully and intentionally absconded two days before his ordered appearance."

The suggestion seems to be that Hall's contempt lay, not in violating the July 2, 1951 order for his surrender, but in disobeying a prior order (presumably made on June 29) that he appear in court on July 2.[18] The suggestion is palpably erroneous as applied to petitioners.[19]

In the first place, there was no evidence that on June 29 Judge Ryan ordered petitioners to appear on July 2, and the trial court made no finding that such an order was made. All that the evidence showed or that the trial court found was that on June 29, petitioners' counsel stated to the judge that he would have his clients in court on the following Monday, and thereafter informed petitioners that their presence on that day was required (R. 9-11, 42, 67). Indeed, as the *Hall* dissent points out (at 732) it elsewhere appears that on June 29 Judge Ryan believed himself powerless to make any orders in the *Dennis* case because he had not yet received the mandate of this Court.

Furthermore, the petitioners were charged with contempt of the order of July 2 and were tried for and convicted of that offense. Obviously, their convictions cannot

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[18] The dissenting judge believed (at 735) that this was the ground on which the majority based its decision.

[19] It was also erroneous on the facts of the *Hall* case.

now be sustained because they violated a different order thereby committing a different offense. *Cole* v. *Arkansas, supra.*

We have shown that there was no evidence that petitioners had knowledge of the order which they were charged with disobeying. We have further shown that the novel theories of guilt advanced by *Hall* as a means of dispensing with evidence of knowledge are fallacious and violate constitutional rights. Accordingly, the convictions should be reversed with directions to enter judgments of acquittal.

II. Disobedience of the Order Requiring Petitioners to Surrender for Commitment Is not Punishable as a Contempt.

United States v. *Hall, supra,* appears to be the first case in the entire history of Anglo-American law in which a defendant, enlarged on bail, was prosecuted for criminal contempt of an order requiring him to appear for trial or surrender for commitment.[20] And there appear to have been no similar prosecutions since *Hall* except against the other *Dennis* defendants who absconded, Thompson [21] and the petitioners. In all other cases of absconding, in the absence of a statute making bail jumping a crime, the practice in this country has been to forfeit the defendant's bail and issue a bench warrant for his arrest. No other

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[20] The dissent in the *Hall* case states (at 734): "Hall's counsel contends that in the whole course of our law as well as that of England there has been no proceeding like the one at bar. The view asserted may be an exaggerated one but exhaustive independent research has disclosed no similar case." It has been held, however, in cases where no order for appearance or surrender was entered, that bail-jumping is not a contempt. *State* v. *Jordy,* 161 La. 104, 108 So. 229; *In re Dill,* 32 Kas. 668, 5 P. 39; *In re Kessler,* 32 Kas. 693, 5 P. 50. Cf. *Ingle* v. *State,* 8 Blackf. 574 (Ind.); *Conley* v. *United States,* 59 F. 2d 929.

[21] See *United States* v. *Thompson, supra.*

punishment is imposed. See, e.g., Orfield, *Criminal Procedure from Arrest to Appeal* (1947), pp. 126-127; *Field* v. *United States*, 193 F. 2d 86, 90; *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 528.[22]

The lack of a single instance prior to 1951 in which the contempt power was asserted in a case of this character either at common law or under American contempt statutes is persuasive evidence that the power is non-existent.[23] The history of 18 U. S. C. 401 and an analysis of its provisions confirm this conclusion.

18 U. S. C. 401 is the lineal descendant of Section 7 of the Judiciary Act of 1789, 1 Stat. 73, 83, which empowered the courts to punish "all contempts of authority in any cause or hearing before the same." Since Section 7 did not define "contempts," its application was confined to conduct which was punishable as a contempt at common law. *Savin, Petitioner*, 131 U. S. 267, 275-76.[24] Cf. *United States* v.

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[22] There have been numerous critiques of the operation of the bail system, including the practice in the case of absconders. See, e.g., Willoughby, *Principles of Judicial Administration* (1929), pp. 561-66; Beeley, *The Bail System in Chicago* (1927); *Report of the New York Crime Commission* (1927); *Report of the Minnesota Crime Commission* (1934); National Commission on Law Enforcement and Observance, *Report on Prosecution* (1931), pp. 89-92. Several of these (e.g., the New York and Minnesota Crime Commission Reports) propose legislation to make bail jumping a crime. But none of them suggests the expedient of the issuance of an order for surrender followed by proceedings in criminal contempt for its disobedience.

[23] "* * * while authority conferred does not atrophy by disuse, failure over an extended period to exercise it is some proof that it was not given." Frankfurter, *Some Reflections on the Reading of Statutes* (1947).

[24] The opinion suggests that the contempt power under the Judiciary Act may be more limited than that exercised at common law. For Mr. Justice Harlan wrote (*ibid.*): "Under that statute [the Judiciary Act] the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law *as were applicable to our situation.*" (Emphasis supplied.)

Palmer, 3 Wheat. 610, 630; *Jerome* v. *United States* 318 U. S. 101, 108, ftn. 6.

The comomn law did not punish absconding in violation of an order for the appearance or surrender of the fugitive, as a contempt. Instead, the absconder was subject to outlawry upon becoming *quinto exactus,* that is upon failing to appear after his presence had been demanded in five successive county courts. 4 *Blackstone, Commentaries* (N. Y. 1854), 318-19; 2 Hale, *Pleas of the Crown* (Dublin, 1778), 201, 224; 1 Pollock and Maitland, *The History of English Law* (2d ed., 1898), 539. If he surrendered before the fifth exaction, he was not held in contempt of the prior demands for his appearance but received no punishment at all. Hale, *loc. cit.* Since absconding in disobedience of an order for appearance or surrender was not a contempt at common law, it was not punishable as such under Section 7 of the Judiciary Act.

Section 7 of the Judiciary Act was supplemented by the Act of March 2, 1831, 4 Stat. 487. The history of that legislation, enacted after the failure of the effort to impeach Judge Peck and designed to prevent judicial usurpation of power to punish for contempt, is too familiar to require repetition. The Act recited that it was "declaratory of the law concerning contempts of court," and provided that:

> "* * * the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, shall not be construed to extend to any cases except * * * the disobedience or resistance by * * * any other person or persons, to any lawful writ, process, order, rule, decree or command of said courts."

The wording of the statute makes it clear that Congress did not intend to extend the contempt power to conduct which was not punishable as a contempt under Section 7 of the Judiciary Act. On the contrary, as the Court has frequently held, the language and legislative history of the Act of 1831 demonstrate that it "represented a deliberate Congressional purpose drastically to curtail the range of

conduct which courts could punish as contempt." *In re Michael*, 326 U. S. 224, 227; *Nye* v. *United States*, 313 U. S. 33; *Cammer* v. *United States*, 350 U. S. 399; *Savin, Petitioner, supra.* See also, Frankfurter and Landis, *Power of Congress over Procedure in the "Inferior" Federal Courts—A Study in the Separation of Powers*, 37 Harv. L. Rev., 1010. It is obvious, therefore, that since disobedience of an order for the surrender of a defendant enlarged on bail was not a contempt under the Judiciary Act of 1789, it did not become a contempt by virtue of the Act of 1831.

18 U. S. C. 401 has the same purport as the Act of 1831. *Cammer* v. *United States, supra.* This appears not only from the fact that Section 401 was derived from the earlier statute (*ibid*) but from its terms. The section does not define contempts. Instead, like its predecessor, it is cast in the form of a limitation on the judicial power to punish them. It authorizes a court to punish "such contempt of its authority, and none other, as * * * (3) Disobedience to its lawful * * * order." The term "contempt of its authority" was taken from the Judiciary Act of 1789 and, like the latter, refers to conduct which was punishable as a contempt at common law. In that context, the effect of the third clause of the section is simply to preserve the contempt power over order-disobedience of the kind which the common law punished as contemptuous. It does not enlarge the class of orders for disobedience of which the contempt power may be invoked.[25]

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[25] This was made even clearer by the phraseology of the immediate predecessor to section 401, 28 U. S. C. (1940 ed.) 385. The latter, in pertinent part, provided: "The said courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except * * * the disobedience or resistance * * * to any lawful writ, process, order, rule, decree, or command of the said courts."

It follows that since disobedience of an order that a fugitive surrender was not a contempt at common law or under the Act of 1789, it is not a contempt under 18 U. S. C. 401.

The court in the *Hall* case, *supra*, at 727, acknowledged that the common law did not consider an absconder who violates an order for his surrender to be in contempt. Nevertheless, it sustained the conviction because it believed that the text of 18 U. S. C. 401 embraces the disobedience of all lawful orders, including those not punishable as contempts at common law. As we have shown, the court was wrong. But even if there were warrant for its conclusion in the text of the section, the court's failure to consider the origin and history of the legislation would provide a blatant example of surrender to the "tyranny of literalness." *United States* v. *Witkovich*, 353 U. S. 194 199.[26]

The decision in *Hall* not only contravenes the purpose of the Act of 1831 and its successors. It also violates the principle which governs the scope of contempt jurisdiction. This court has often held that because of the summary nature of criminal contempt proceedings and the fact that they are tried without a jury, the contempt power should be limited to "the least possible power adequate to the end proposed." See, *e.g.*, *In re Michael*, *supra*, at 277. As was said in *Offutt* v. *United States*, 348 U. S. 11, 14:

> "The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes gen-

[26] 18 U. S. C. 3146, enacted two years after the *Hall* case, makes bail jumping a crime and provides that, "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." This savings clause, apparently inspired by the erroneous decision in *Hall*, obviously does not enlarge the contempt power defined in section 401 or have any relevance to the construction of that section.

erally, is that the necessities of the administration of justice require such summary dealings with obstructions to it. It is a mode of vindicating the majesty of the law in its active manifestation."

At least since outlawry fell into disuse, English and American courts have regarded forfeitures of bail and the issuance of bench warrants as sufficient to "vindicate the majesty of the law" against absconders. The total lack of precedent attests that there is no foundation in necessity for the novel use of the contempt power sanctioned in *Hall*.[27] Moreover, this judicial innovation has a vindictive quality which the court should not countenance. For it was conceived at the height of the anti-Communist hysteria and has been used exclusively against four Communists to impose punishment over and above their sentences for a political crime.

Since, as we have shown, the District Court was without jurisdiction to proceed against petitioners for contempt, their convictions should be reversed with directions to dismiss the proceedings.

III. The Trial Court Was Without Power to Sentence Petitioners to Terms in Excess of One Year.

The question presented by the three-year sentences against petitioners is whether the federal courts have unlimited power to punish criminal contempt by imprisonment for any term, including life.[28] It is petitioners' position that this question must be answered in the negative,

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[27] If the legislature believes that forfeiture of bail is insufficient punishment for absconding, it can of course make bail-jumping a crime. See, e.g., 18 U. S. C. 3146, *supra*, ftn. 26 and N. Y. Penal Law, Sec. 1694-a.

[28] Subject only to the limitation, if any, of the Eighth Amendment prohibition against cruel and unusual punishment.

and that the courts are restricted to the imposition of sentence for contempt as in the case of offenses which are not infamous.

An infamous offense is one which may be punished by confinement in a penitentiary. *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348. Such confinement is authorized where the sentence is for a term in excess of one year. 18 U. S. C. 4083.[29] It follows that all offenses punishable by imprisonment for more than one year are infamous. (See Notes of Advisory Committee on Rules to Rule 7, Federal Rules of Criminal Procedure.) Accordingly, if contempt is not an infamous offense, it may not be punished by a sentence in excess of one year.

Put in other words, it is petitioners' position that contempts are misdemeanors and not felonies as these are defined in 18 U. S. C. 1.[30]

As we shall show, the conclusion that contempt is not an infamous offense finds support in 18 U. S. C. 401 and, in any event, is required by Section 24 of the Clayton Act, 38 Stat. 739 [31] and by Rule 7 of the Rules of Criminal Procedure. Furthermore, a contrary conclusion would violate

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[29] Derived from the Act of March 3, 1865, 13 Stat. 500. See *In re Mills*, 135 U. S. 263, 270.

[30] In England, contempts have always been classified as misdemeanors. 7 Halsbury, *Laws of England*, 280; Fox, *Practice in Contempt of Court Cases*, 38 L. Q. Rev. 197. As the opinion of the trial court points out (R. 69), misdemeanors were punishable as infamous offenses at common law. However, all or substantially all of the states have classified crimes "as felonies or as misdemeanors accordingly as they are or are not punishable by imprisonment in the state prison or penitentiary." *Mackin* v. *United States, supra*, at 352-53; 1 Wharton, *Criminal Law* (12th ed.) 37. The same classification obtains federally by virtue of 18 U. S. C. 4083 and 18 U. S. C. 1.

[31] Now contained in 18 U. S. C. 402. See *infra*, p. 31.

the clause of the Fifth Amendment requiring the prosecution of infamous crimes by indictment.

18 U. S. C. 401, in language derived from the Judiciary Act of 1789, authorizes a federal court to punish contempts "by fine or imprisonment, at its discretion." [32] The court below thought that the words "at its discretion" gave the courts unlimited power over the length and character of prison sentences (R. 78). But there are countervailing considerations.

First, since the contempt statutes have always provided for fine *or* imprisonment, in the alternative, the courts are without power to impose both penalties for the same contempt. *In re Bradley*, 318 U. S. 50. This limitation is intelligible if the term "imprisonment" means a jail sentence of relatively short duration. But the statute would violate common sense if construed to authorize either a fine or imprisonment for life, but to prohibit a sentence of a $500 fine and ten days in jail.

Moreover, to construe "at its discretion" as authorizing infamous punishment would make every contempt a felony. But contempt embraces a wide range of offenses, including minor infractions which are punished, if at all, by small fines or nominal jail sentences. Surely, the equivocal reference to "discretion" in Section 401 is insufficient to impute to Congress the intention of subjecting every person found guilty of some minor contempt to the disabilities imposed on a felon.

The best that can be said of the punishment provisions of Section 401 is that they are ambiguous. Accordingly the ambiguity must be resolved in favor of the accused. *United States* v. *Universal C. I. T. Credit Corporation*, 344 U. S. 218, 221-22. This rule of construction has been held

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[32] Section 7 of the Judiciary Act of 1789 authorized the courts "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

to preclude infamous punishment for contempt under a state statute substantially identical with Section 401 except that it authorizes both fine *and* imprisonment for the same offense.[33] *Brown* v. *State*, 89 Okla. Cr. 443, 209 P. 2d 715.[34] And cf. *State* v. *Di Paglia* (Sup. Ct. Ia.), 71 N. W. 2d 601, which collects numerous state court decisions holding that unless the legislature has clearly manifested a contrary intention, the term "imprisonment" does not authorize infamous punishment but means confinement in a jail, not a penitentiary.

Thus, the wording of Section 401 and its predecessors supports the proposition that contempt may not be punished as an infamous offense. And the fact is that this limitation on the power to punish contempts was adhered to in practice from the adoption of the Judiciary Act of 1789 until 1916.[35] During that period, there was no reported case, federal or state, of a sentence in excess of one year or other infamous punishment for contempt.

In 1916 the Supreme Court of Iowa could state, upon invalidating a statute which authorized a penitentiary sentence for violation of a liquor injunction:

> "The authorities may be searched in vain for any precedent, under our constitutional form of government, holding it to be within the power of a state to clothe its courts with authority to visit infamous punishment upon any person for contempt * * *"

Flannagan v. *Jepson*, 177 Ia. 393, 158 N. W. 641, 643.

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[33] The statute provides that, "Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court." 21 Okla. Stats. 566.

[34] See also, *Rogers Mfg. Co.* v. *Rogers*, 38 Conn. 121, which states as axiomatic that imprisonment for contempt must be in a common jail and not elsewhere.

[35] The date of the decision in *Creekmore* v. *United States*, 237 F. 243, *infra*, p. 33.

The century and a quarter of undeviating American practice noted by the Iowa court was frozen into statutory law by Section 24 of the Clayton Act of 1914. Sections 21 and 22 of the Clayton Act relate to contempts for disobedience of court orders where the contemptuous conduct is a criminal offense under federal or state law. Section 22 requires contempts of this character to be tried by a jury and fixes the maximum punishment at imprisonment for six months and a fine (payable to the United States) of $1000. Section 24 of the same Act provides:

> "Nothing herein [in secs. 21 and 22] contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, *but the same, and all other cases of contempt not specifically embraced within section 21 of this Act, may be punished in conformity to the usages at law and in equity now prevailing.*" (Emphasis supplied.)[36]

Section 24 accomplishes two purposes. By its first clause, it excludes certain kinds of contempt (including the kind involved here) from the jury trial requirement and limitation on punishment contained in Section 22. By its second clause (which we have italicized), it limits the nature of the punishment for contempts of the excluded categories to that which prevailed on October 15, 1914, the date of enactment of the Act.

The legislative history contains no discussion of the second clause of Section 24, which we will refer to as the

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[36] The substance of sections 21, 22 and 24 of the Clayton Act is now contained in 18 U. S. C. 402 and (as to jury trials) 18 U. S. C. 3691. (See *infra*, p. 31.)

"prevailing usage clause." [37] But its language is plain and familiar principles of statutory construction require that it be given effect. *McDonald* v. *Thompson,* 305 U. S. 263, 266. Hence the punishment for contempts of the classes described in Section 24 must be determined by reference to the usage which prevailed in 1914.

As we have shown, the usage which prevailed without exception from 1789 until after the date of the Clayton Act was to punish contempts as offenses not infamous. Under the predecessor to 18 U. S. C. 4083 in force in 1914, all offenses punishable by prison terms in excess of one year were infamous. (See *supra,* ftn. 29.) Hence, Section 24 of the Clayton Act limited imprisonment for the contempts therein described to terms of not more than one year.[38]

Congress incorporated the substance of Section 24 of the Clayton Act into 18 U. S. C. 402 in the 1948 revision and codification of the criminal statutes. Section 402 substitutes the phrase, "in conformity to the prevailing usages at law" for the original wording, "in conformity to the usages at equity and law now prevailing." [38a] This modification in phraseology, however, did not change the effect of the original enactment. It is well established that "it

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[37] Congressman Clayton advised the House that contempts for disobedience of orders entered in actions to which the United States is a party were excepted from sections 21 and 22 so as not to weaken the power of the courts to enforce dissolution decrees in anti-trust cases. 48 Cong. Rec. 22591.

[38] This is twice the maximum term provided for the contempts covered by sections 21 and 22.

[38a] Section 151 of the Senate version of the pending Civil Rights Bill amends 18 U. S. C. 402 by making the maximum prison sentence of six months and fine of $1000 applicable to *all* cases of criminal contempt involving order-disobedience not committed by an officer of the court or in the presence of the court or so near thereto as to obstruct the administration of justice. See H. R. 6127, 85th Cong. 1st Sess.

will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199.[39] The Reviser's Notes to Section 402 specifically state that the differences in phraseology between that section and Sections 22 and 24 of the Clayton Act "do not, however, change their meaning or substance." (18 U. S. C. A. 402, Reviser's Notes.) This statement is entitled to great weight in construing the legislation. *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U. S. 247, 255. Indeed, it is conclusive in the absence of any Congressional expression to the contrary.[40]

It is clear, therefore, that Section 402 did not change the date specified in Section 24 of the Clayton Act for determining the "prevailing usage." Accordingly, Section 402, like its predecessor, codifies the usage as to punishment which prevailed in 1914 and prohibits the courts from imposing contempt sentences in excess of one year.

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[39] Congress recognized that this rule of construction was applicable to the codification of Title 18. See report of Representative Keogh to the American Bar Association, 92 Cong. Rec. A-61, A-62.

[40] The Reviser's Notes to Title 18 were made an appendix to the House Committee Report. This was done after the Reviser had informed the Committee that, "Every substantive change, no matter how minor, is fully explained [in the Reviser's Notes] so that if you in your discretion see fit to make these notes part of your report, they will adequately serve to interpret every proposed change." (Hearings before Committee on Revision of the Laws, 78th Cong., 2d Sess., on H.R. 5450, Dec. 6, 1944, p. 11.) Moreover, the reports of both the House and the Senate Committees state that these Notes contain a detailed explanation of every change made in the text of prior legislation. H. Rept. No. 304, 80th Cong., 1st Sess., on H.R. 3190, p. 9; S. Rept. No. 1620, 80th Cong., 2d Sess., on H.R. 3190, p. 2.

The same limitation on the punishment of contempts is imposed by Rule 7(a) of the Federal Rules of Criminal Procedure. The Rule provides that, "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment * * *" The Rules cover criminal contempts. (See Notes of Advisory Committee on Rules to Rule 1, and Rule 42.) Although the question whether criminal contempt is a "crime" has been much debated, it is plainly an "offense." *New Orleans* v. *The Steamship Company*, 87 U. S. 387, 392. The requirement of Rule 7 is therefore applicable to contempts. Since they never have been and, under Rule 42, are not prosecuted by indictment, they may not be punished by imprisonment for more than a year.

As we have seen, there is no reported case of infamous punishment for contempt prior to 1916. The subsequent history in the state courts is illuminating. There have been only two reported cases of infamous punishment, in both of which the sentences were invalidated on appeal. *Flannagan* v. *Jepson*; *Brown* v. *State*, both *supra*. Currently, thirty-six states regulate the punishment for criminal contempt by statute. In nineteen, the maximum jail term is thirty days or less; in eight, six months or less, and in two, one year. Three states make criminal contempt punishable as a misdemeanor. Four have enacted provisions along the lines of section 401. The state statutes are summarized in Appendix B, *infra*.

We now turn to the federal authorities. Since 1916 there have been nine reported instances of infamous punishment (i.e., prison terms of more than one year). *Greekmore* v. *United States* (C. A. 8, 1916), 237 F. 743 (a year and a day); *Conley* v. *United States* (C. A. 8, 1932), 59 F. 2d 929 (two years); *Hill* v. *United States* (1937), 300 U. S. 105 (two years); *Warring* v. *Huff* (C. A. D. C., 1941), 122 F. 2d 641 (a year and a month); *United States* v. *Lederer*

(C. A. 7), 140 F. 2d 136 (a year and a day); *United States* v. *Hall* (C. A. 2, 1952), 198 F. 2d 726 (three years); *United States* v. *Thompson* (C. A. 2, 1954), 214 F. 2d 545 (four years); *Lopiparo* v. *United States* (C. A. 8, 1954), 216 F. 2d 87 (eighteen months); *United States* v. *Brown* (C. A. 2, July 10, 1957), not yet reported (fifteen months).[41]

The question of the power to impose contempt sentences of more than one year was not raised or considered in any of these cases except *Creekmore* v. *United States*.[42] The latter, decided two years after enactment of the Clayton Act, does not mention Section 24 which evidently was not called to the court's attention. And since the decision antedated the Federal Rules by many years, no consideration was given to the effect of Rule 7(a).

The court below rejected petitioners' construction of the prevailing usage clause of Section 24 of the Clayton Act. It stated (R. 77-78) that, "The 'usages now prevailing' meant practices that the courts for one reason or another thought controlling, not limitations that, so far as appears, they thought the particular occasion demanded on the merits."

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[41] In one additional case this Court vacated a contempt sentence of a year and a day. *Nilva* v. *United States*, 352 U. S. 385. In a second, a three-year sentence was reversed on appeal. *Yates* v. *United States* (C. A. 9), 227 F. 2d 844. The power of the courts to punish contempt as a felony was not considered in either case.

[42] Observations in some of the other cases to the effect that the length of a contempt sentence is discretionary are dicta. *Hill* v. *United States* decided that section 22 of the Clayton Act does not govern the sentence which may be imposed for violation of an antitrust decree entered in an action by the United States. *Warring* v. *Huff* decided that the Indeterminate Sentence Act is inapplicable to contempts. *United States* v. *Lederer* decided that where contemptuous conduct is also punishable as a crime, a contempt sentence may exceed the maximum sentence specified for the crime. The remaining cases in which the sentences were challenged held that the sentences did not violate due process or the prohibition against cruel and unusual punishment and did not constitute an abuse of discretion.

The first difficulty with this reasoning is that it accounts for a century and a quarter of uniform judicial practice as a coincidence. Surely, it is unreasonable to assume that the first one hundred and twenty-five years of our history presented no contempt case in which a court thought that sentence of more than one year was "demanded on the merits."[43] There are other and far more plausible explanations for the undeviating practice of punishing contempts as offenses not infamous.

The practice may have had its foundation in the belief that section 7 of the Judiciary Act of 1789 and its successors did not authorize infamous punishment. (See *supra*, p. 28.) Perhaps it was the product of judicial self-restraint, dictated by the summary nature of contempt procedure and the lack of a jury trial. Perhaps the constitutional question posed by the requirement that infamous crimes be prosecuted by indictment (*infra*, p. 37) lay in the background of judicial thought. It seems obvious that it was considerations like these and not, as suggested below, the lack of a "particular occasion" which underlay the practice of punishing contempts as misdemeanors.

Moreover, the court below failed to consider the purpose which animated the contempt provisions of the Clayton Act. Congress enacted them because of its recurring concern over judicial abuse and usurpation of power in contempt cases. See Frankfurter and Landis, *supra*. Section 22 modified the prior practice of punishment with respect to a specified class of contempts by limiting prison sentences to six months and fines to $1,000. As we have seen, the first clause of section 24 excluded all other classes of contempts from the provisions of

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[43] See, e.g., *United States* v. *Shipp*, 214 U. S. 386, 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a Negro prisoner in flagrant violation of its order that the custody of the prisoner remain in status quo pending review of his conviction. See also the three and six month sentences in *In re Debs*, 158 U. S. 564.

section 22. But section 24 did not stop there. Congress was evidently concerned with preventing innovations in the punishment of contempts of the excluded categories. It therefore added the prevailing usage clause to section 24, and thereby required the courts to adhere to the practice of punishing these contempts as misdemeanors and not as felonies.

The construction of the prevailing usage clause by the court below makes it a redundancy. For the court could not suggest any practice, other than the practice of punishing contempt as a misdemeanor, which the clause was designed to freeze into statutory law. The purpose of the clause could not have been to sanction the practice of trying contempts of the kind not covered by section 21 before a judge rather than a jury. That purpose was accomplished by the first clause of section 24 which makes all of the provisions of section 22 (including the provision for jury trials) inapplicable to such contempts. Hence, if the prevailing usage clause does not limit the character of prison sentences for contempts not covered by section 22, it adds nothing to the first clause of section 24. But the prevailing usage clause may not be disregarded as surplusage. *McDonald* v. *Thompson, supra.*

The court below believed (R. 78-79) that the enactment in 1954 of 18 U. S. C. 3146 fortified its construction of section 24 and made consideration of Rule 7(a) of the Criminal Rules unnecessary. Section 3146 creates the crime of bail-jumping and punishes it by a maximum sentence of five years where the accused is bailed on a felony charge and one year where the charge is a misdemeanor. The reasoning of the court seems to be that Congress would not have specified a sentence of five years for the crime if it had thought that the maximum contempt sentence for the same offense [44] was only one-fifth as long. Hence,

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[44] The statute is broader than any possible reach of the contempt power since it makes bail-jumping a crime even though no order has been entered requiring the appearance of the accused.

the Court concluded, neither section 24 nor Rule 7 could have been intended to place a one-year limitation on contempt sentences.

But obviously the terms of a statute passed in 1954 can shed no light on what Congress intended by a statute passed in 1914. Much less can they illuminate the intention of this Court when it adopted the Criminal Rules in 1944. Moreover, even if section 3146 could be said to have any relevance to the question at hand, it would point to a conclusion contrary to the one drawn by the court. For it would be more reasonable to suppose that section 3146 was enacted because Congress thought a one-year sentence inadequate for the offense and entertained doubt as to the power of the courts, in contempt proceedings, to punish it with greater severity.

We believe that we have shown, contrary to the decision below, that section 24 of the Clayton Act and Rule 7(a) of the Criminal Rules limit contempt sentences to terms of not more than a year and that the same limitation is implicit in 18 U. S. C. 401. At the very least, we have demonstrated that this conclusion is tenable. If so, it should be adopted. For a contrary conclusion would give rise to a major constitutional question and violate the principle that, if possible, statutes should be construed to avoid problems of constitutionality. *United States* v. *Rumely*, 345 U. S. 41, 45.

The constitutional question which rejection of petitioners' contention would present is whether criminal contempt is a "crime" within the meaning of the clause of the Fifth Amendment requiring infamous crimes to be prosecuted by indictment. The Court has never been confronted with this question. But in *Gompers* v. *United States*, 233 U. S. 604, 610, it declared that if criminal contempts "are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." Accordingly, many constitutional and statutory provisions for the protection of

those accused of crime have been held applicable to criminal contempts.[45] The one exception to the treatment of criminal contempts as crimes is the holding that they are not "criminal prosecutions" within the jury trial requirement of the Sixth Amendment. Although it is now recognized that this exception rests on an historical error,[46] it is perhaps too late in the day for judicial correction of the mistake.[47] But certainly the consequences of the error should not be extended to other constitutional guarantees.

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[45] The prohibition against double jeopardy; the privilege against being called as a witness; the right to a speedy trial, compulsory process and the assistance of counsel; the presumption of innocence; proof of guilt beyond a reasonable doubt; the pardon power of the President, and the statute of limitations applicable to crimes. *In re Bradley*, 318 U. S. 50; *Gompers* v. *Buck Stove and Range Company*, 221 U. S. 418; *Blackmer* v. *United States*, 284 U. S. 421; *Cooke* v. *United*, 267 U. S. 517; *Ex Parte Grossman*, 267 U. S. 87; *Gompers* v. *United States*, 233 U. S. 604.

[46] A statement in an unpublished opinion by Wilmot, J., in *Almon's Case* (1765) that it was "immemorial usage" to punish all contempts summarily. Blackstone quoted the statement, giving it currency and the stamp of authority in this country. See Fox, *The History of Contempt of Court* (1927) and Frankfurter and Landis, *supra*. As Mr. Justice Holmes has written, "it seems to be proved that in the early law they [criminal contempts] were punished only by the usual criminal procedure * * * and that at least in England it seems that they still may be and preferably are tried in that way." *Gompers* v. *United States*, *supra*, at 611.

[47] Sections 21 and 22 of the Clayton Act (18 U. S. C. 3691) rectified the error in part by requiring jury trials for certain criminal contempts. And section 152 of the Senate version of the pending Civil Rights Bill (H.R. 6127, 85th Cong., 1st Sess.) amends 18 U. S. C. 3691 to provide for jury trials of all criminal contempts involving order-disobedience not committed by an officer of the court or in the presence of the court or so near thereto as to obstruct the administration of justice.

The opinion below acknowledges that the constitutional question is not free from doubt. However, the court did not consider that fact in construing section 24 of the Clayton Act, Rule 7(a) of the Criminal Rules and 18 U. S. C. 401. It agreed that the decisions excepting criminal contempts from the jury trial requirement of the Sixth Amendment rest on "faulty history." Nevertheless, it held that contempts, if infamous crimes, need not be prosecuted by indictment because "it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceeding must be by an indictment, and yet that it need not be tried to a jury." (R. 76.)

But there is no rule of construction that requires the compounding of error for the sake of being consistently wrong. Cf. *Radovich* v. *National Football League*, 352 U. S. 445. Moreover, petitioners' contention involves no anomaly. If we are right, criminal contempts are not subject to infamous punishment, may not be punished by imprisonment for more than one year, and are therefore not infamous crimes within the Amendment. Accordingly, they need not be prosecuted by indictment.[48]

The statutory limitation for which we contend on the power to punish contempts avoids the constitutional question. It equates federal practice with that which prevails in every state (see p. 33, *supra*, and App. B, *infra*). Moreover, it implements the sound democratic principle stated by Mr. Justice Field that:

> "The law of our country takes care, or should take care, that not the weight of a judge's finger

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[48] In disposing of the constitutional question, the court below also relied on the saving clause of the bail-jumping statute (18 U. S. C. 3146) that, "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." The opinion states (R. 76-77) that this clause "was a recognition of the power as it had then developed." But the saving clause does not recognize the existence of judicial power to impose *infamous* punishment for contempt. In any event, Congressional recognition of an unconstitutional power does not make the power constitutional.

> shall fall upon anyone except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution * * *."
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> *In re Bonner*, 151 U. S. 242, 259.

The fact that criminal contempts are punishable only as misdemeanors does not prevent the exaction of harsher penalties for contemptuous conduct of a serious nature. For Congress, of course, can make such conduct a crime. Thus, the Act of 1831 curtailing the contempt power created the crime of obstructing justice, now punishable by imprisonment for five years. See *Nye* v. *United States*, *supra*, at 46 and 18 U. S. C. 1503. And 18 U. S. C. 3146 now provides a five-year sentence for the conduct charged against petitioners.

Accordingly, the effect of sections 401, 402 and Rule 7 in equating contempts with misdemeanors for the purpose of punishment is simply to afford an accused the protections of indictment and trial by jury before he can be convicted of an infamous offense, penalized by a prolonged penitentiary sentence and subjected to the disabilities imposed upon felons.

Since petitioners' sentences were beyond the power of the trial court to impose, the sentences should be corrected by the Court or the proceedings remanded for resentencing.

IV. The Trial Court Abused Its Discretion in Sentencing Petitioners to Imprisonment for Three Years.

Except for *United States* v. *Hall* and *United States* v. *Thompson*, both *supra*, there has been no reported case of a contempt sentence in excess of two years (see *supra*, p.

33).[49] We believe that the three and four-year sentences imposed on Hall and Thompson were excessive. In any event, the present cases are distinguishable on their facts. Hall and Thompson were apprehended, while petitioners voluntarily submitted themselves to the authority of the court.

The court below held that since 18 U. S. C. 3146 fixes a maximum sentence of five years for the crime of bail jumping, a three-year sentence is not excessive for the offense when prosecuted as a contempt (R. 79).[50] The court saw no reason to hold that "the maximum punishment for the same offense should depend upon the mode of trial" (R. 78-79). We believe that the court was wrong. It is one thing to punish a man with a long penitentiary sentence which has been authorized by Congress upon conviction after indictment and trial by jury. It is quite another to impose the same sentence upon a summary conviction for contempt, even assuming that such a sentence is within the power of the court. In the latter case, the guiding principle should be exertion of "the least possible power to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231. The three-year sentences imposed here, consecutive upon five-year sentences under the Smith Act, violate that principle. For "the end proposed" was the vindication of the authority of the court, to which petitioners, albeit belatedly, had voluntarily submitted.

The Court should therefore reduce petitioners' sentences as excessive. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 304.

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[49] In the remaining cases in which sentences of more than one year were affirmed, the sentences were as follows: a year and a day (two cases); a year and a month (one case); fifteen months (one case); eighteen months (one case), and two years (two cases).

[50] The court also relied on the precedent of the *Hall* and *Thompson* cases (*ibid.*).

Conclusion

The use of the contempt power to punish the *Dennis* fugitives for absconding is without precedent in Anglo-American law. The theory of guilt upon which they were convicted is likewise unprecedented. And their sentences are of unparalleled severity. In these respects, as we have shown, the convictions and sentences are unauthorized by law and impinge on constitutionally protected rights.[51]

Accordingly, the judgments against petitioners should be reversed with directions to dismiss the proceedings or enter judgments of acquittal.

Respectfully submitted,

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[51] Hall has completed serving his sentences except for the period of conditional release. Thompson has been enlarged on bail in a proceeding under 28 U. S. C. 2255 pending the decision of the Court in the present cases.

APPENDIX A

Constitutional and Statutory Provisions Involved

Amendment V of the Constitution provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

18 U. S. C. 401, 62 Stat. 701, provides in part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402, 63 Stat. 90, provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the

fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 7(a) of the Federal Rules of Criminal Procedure provides:

Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

APPENDIX B

Digest of State Statutes Specifying Punishment for Criminal Contempt

Maximum Penalty	*Reference*
$100 and 10 days.	13 Code 9
If the act is also a criminal offense, $1,000 and 6 months; otherwise, "in conformity to practice and usage of the common law."	27 Code 601-04
$50 and 10 days.	34 Stats. 902
$500 and 5 days.	Code Civ. Pro., 1218
No provision.	
$100 and 6 months.	Gen'l Stats., 7702, 8826
No provision.	
No provision.	
$500 and 20 days.	24 Code 2615, 3901
$500 and 5 days.	Code, 7-610
No provision.	
$500 and 3 months.	3 Stat. 906
$1,000 and 6 months.	665 Code 4
No provision.	
$30 and 30 hours where no jury.	432 R. S. 260
$100 and 10 days.	15 R. S. 12
No provision.	
No provision.	
Misdemeanor; commitment to common jail only.	274 Laws 1; 220 Laws 14
$250 and 30 days.	605 Laws 20

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State	*Maximum Penalty*	*Reference*
Minn.	$250 and 6 months.	588 Stats. 10
Miss.	$100 and 30 days.	7 Code 1656
Mo.	Misdemeanor; $1000 and 1 year.	R. S. 476.120, 556.040, 556.460
Mont.	Misdemeanor; $500 and 6 months.	94 Code 116, 3540
Neb.	No provision.	
Nev.	$500 and 25 days.	Laws, 8950
N. H.	No provision.	
N. J.	No provision.	
N. M.	"Usage of the courts of the United States."	16 Stats. 1-2
N. Y.	Misdemeanor; $250 and 30 days.	Penal Law, 600; Judiciary Law, 751
N. C.	$250 and 30 days.	5 Gen. Stats. 4
N. D.	$250 and 30 days.	27 Code 1002
Ohio	$500 and 10 days.	Code, 12142
Okla.	Fine and imprisonment at discretion of the court.	21 Stats. 566
Ore.	$300 and 6 months.	R. S. 33.020
Pa.	Fine only when contempt not committed in open court.	17 Stats. 2042
R. I.	Fine or imprisonment or both.	Chap. 500 Gen'l Laws, Sec. 30 (1938)
S. C.	Imprisonment in penitentiary prohibited.	Constit., Art. 4, Sec. 19
S. D.	Misdemeanor; $500 and 1 year.	Code, 13.0607, 13.1235
Tenn.	$50 and 10 days.	Code, 10120

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State	*Maximum Penalty*	*Reference*
Tex.	$100 and 3 days.	Stats., 1911
Utah	$200 and 30 days.	78 Code 32-10
Vt.	Misdemeanor.	Stats. 1274, 8615, 9966
Va.	No provision.	
Wash.	$300 and 6 months.	R. Code, 7.20.020
W. Va.	No provision.	
Wisc.	Fine and 6 months.	295 Stats. 12
Wyo.	No provision.	